the goods by its contract of carriage. In that situation, it is my view that the Rules applied to the lightering. The lightering should be considered as a part of the discharging operation, but even if the discharging of the goods concerned from the Crosbie was completed when they were put on the barge, the barge was a ship used by the carrier in performing its obligation to carry the goods by water under the contract of carriage covered by the bill of lading and consequently, in my view, the Rules applied to that portion of the carriage."

In the present case the first defendants' obligations included the operation of "discharge". The Hague Rules make them liable for losses sustained during that operation. The cases show that "discharge" no longer means "release of the goods from the tackle of the vessel named in the bill of lading". In my judgment, both on principle and authority, the line should be drawn, not when the goods leave the ship, but when the carriage by sea is concluded. The first defendants discharged the goods into lighters for some reason best known to them. They apparently did so to suit their own convenience. In those circumstances, in my opinion, the carriage by sea had not yet been concluded when the goods were in the lighters and were damaged by rain water. In my judgment the Hague Rules continued to apply whilst the goods were in the lighters. And under Art. III Rule 2 the first defendants were under a duty to see that the lighters were seaworthy, properly equipped and properly handled. There was a clear duty to "properly and carefully care for" the goods while they were in the lighters. As the damage resulted from lack of care on the part of the lightermen, the first defendants were liable for the damage.

As regards the submission of counsel for the first defendants that his clients were not liable because it has never been expressly decided that a ship is responsible for the lighterage phase under the Hague Rules, it may be that there is no previous decision fitting the facts of this case, but that in my opinion is no answer. Where the court finds that in order to do justice between the parties, the facts warrant the breaking of new ground and the law permits it, the court should not hesitate to do its duty.

In my judgment the Hague Rules continued to apply whilst the goods were in the lighters and therefore I did not consider it necessary to examine the question whether the exceptions printed on the back of the bills excluded the first defendants' liability for losses suffered during lighterage. If the exceptions are wider than those conferred by the Rules, they are nullified by Art. III A, Rule 8.

The final question which I had to decide in this case was, whether the first defendants were entitled to an indemnity from the second defendants in respect of all the monies which the first defendants were called upon to pay to the plaintiffs in respect of the "Jens" cargo. In my opinion they were so entitled, on the authority of *The Winkfield*,[12] and *Gilchrist Watt Ltd.* v. *York Products, supra.*

It was for these reasons that the following judgments were entered in this case: —

(1) Judgment for the plaintiffs against the first defendants in respect of the "Lars" cargo for $56,298.80 and interest thereon at 8% per annum from the 7th October 1968 to date of judgment and costs as taxed.

(2) Judgment for the plaintiffs against the first and second defendants in respect of the "Jens" cargo for $26,845 and interest thereon at 8% per annum from the 7th October 1968 to date of judgment and costs as taxed.

(3) Judgment for the first defendants against the second defendants in respect of all monies paid by them to the plaintiffs in respect of the "Jens" cargo and costs as taxed.

(4) The plaintiffs' claim against the second defendants in respect of the "Lars" cargo was dismissed with costs.

Order accordingly.

Solicitors: *Allen & Gledhill; Drew & Napier; Hilborne & Co.*

DOBB & CO. LTD. v. HECLA

[A.C.J. (Winslow J.) September 19, 1973]

[Singapore — District Court Appeal No. 11 of 1973]

Tort — Negligence — Contractor responsible for erection of scaffolding in front of high building — Scaffolding in dangerous condition — Whether contractor liable in damages to workman of another contractor working on the same premises — Duty of one invitee to another invitee — Workmen's Compensation Act (Cap. 130), s. 20(b) — Workmen's Compensation Regulations, 1955.

The question in this case was whether an independent contractor responsible for the erection of scaffolding in front of a high building is liable in damages to the workman of another independent contractor responsible for the erection of scaffolding at the back of the same building in respect of injuries suffered by the workman whilst using the scaffolding in front which was in a dangerous condition and collapsed while so used. The appellants had paid compensation to the workman under the Workmen's Compensation Act and claim an indemnity from the respondents, the contractors responsible for the scaffolding at the front of the building. The learned district judge held that there was no evidence that the respondents knew that the appellant's workers or any others apart from their own workers used the scaffolding in front. He therefore held that the respondents owed no duty of care to the workman. The appellant appealed.

Held: (1) a person who though not an occupier of premises actually creates a danger and has reason to expect other persons will be lawfully on the premises during the existence of that danger owes them a duty to take reasonable care. In this case the respondents gave no evidence to show that the right to use their scaffolding was confined to their own workmen or that others were excluded and it was clear from the evidence that both the appellants and the respondents and their respective workmen were invitees on the premises;

(2) the respondents by their failure to repair or remove their dangerous scaffolding after being repeatedly warned by the architect to do so created a situation which they could reasonably forsee would be likely to injure persons like the workman in question who clearly fell within the proximity rule.

Cases referred to:-

(1) *Kimber* v. *Gas Light & Coke* [1918] 1 K.B. 445.

(2) *Hawkins* v. *Thames Stevedore Co.* [1936] 2 All E.R. 472.

(3) *Miller* v. *Smith of Scotland Electricity Board* [1958] S.C. (H.L.) 37.

(4) *Donoghue* v. *Stevenson* [1932] A.C. 562.

DISTRICT COURT APPEAL.

C. S. Wu for the appellants.

Charles Ng Chin Fong for the respondents.

Winslow J.: This appeal poses the question whether an independent contractor responsible for the erection of scaffolding in the front of a high building is liable in damages to the workman of another independent contractor responsible for the erection of scaffolding at the back of the same building in respect of injuries suffered by the workman whilst using the scaffolding in front which was in a dangerous condition and collapsed, as a consequence, when so used.

The appellants claimed an indemnity in the District Court under section 20(b) of the Workmen's Compensation Act (Cap. 130) for compensation amounting to $3,327.96 paid by them as his principals under section 19(1) thereof from the respondents on the ground that they were entitled to be so indemnified if the respondents were, in fact, under a legal liability in negligence to pay damages for the injuries sustained by the workman concerned.

The District Judge found that there was no evidence that the respondents knew that the appellants' workers or any others apart from their own workers, for whom the scaffolding was constructed, used the scaffolding in front. He found as a fact that "the appellants' contract was confined to the back of the building while the respondents' was at the front of the building... There was no evidence of any restriction or authority to other workers not to use or to use the scaffolding in the front of the building."

The District Judge accordingly held that a duty of care did not extend to the workman, that there was accordingly no breach of duty to take reasonable care towards him and that in the circumstances there was no negligence on the part of the defendants.

The architects' site representative and clerk of works, Ng Meo Ling (PW3) said that there was no restriction on the use of the respondents' scaffolding by other workers on the site. He recommended the removal or repair of this scaffolding just over a week before its collapse on the occasion when the workman of the appellants was injured. He said that during that week or more no workman used the front scaffolding but he added that workmen "were using the other section".

The appellants' contracts supervisor, Ang (PW2), said that he had only warned the workman's immediate employer that the scaffolding in question was dangerous. There was no evidence that he had warned the workman himself or that the workman himself knew of this danger. Counsel for the respondents had earlier asked this witness a pertinent question in cross-examination as follows:—

"Q. Did you tell the (appellants') workmen that the scaffolding was dangerous and no attempt should be made to climb it?"

Why this question was put when the stand taken by the respondents was that the appellants or their workmen had no right or business to use the scaffolding of the respondents in front is not clear.

The respondents gave no evidence during their defence to show that the right to use their scaffolding was confined to their own workmen or at least, that others were excluded. In fact no evidence was given by the defence at all except to show that their scaffolding was in a dangerous structural condition, a fact which had already been established at the close of the plaintiffs' case.

It is clear from all the evidence that both the appellants and the respondents and their respective workmen were invitees of the Hotel whilst engaged in carrying out their respective tiling contracts relating to the outer walls of the building. None of them were accordingly trespassers in respect of the building and they had a right to be there even though some of the scaffoldings at the rear, according to the clerk of works, Ng, were erected and maintained by the appellants and the scaffolding in front was maintained by the respondents. This was the scaffolding which collapsed. These were the only two contractors who put up scaffoldings and it follows that the respondents also put up scaffoldings at the back (see also para. 3 of Ex. P2).

Possession or control of any particular part of the building was not therefore shown to be exclusively in one or the other alone of these contractors.

When an invitee creates a danger (whilst fulfilling his contractual duties) to which other invitees to the building are exposed there is a duty on his part to take such care as is reasonable in all the circumstances to prevent such others from coming to harm as a result of the danger he has himself created and for which he is responsible.

A person who, though not an occupier of premises, actually creates a danger and has reason to expect that other persons will be lawfully on the premises during the existence of that danger owes them a duty to take reasonable care. This duty "arises quite independently of the occupation of premises. It does not arise out of any invitation or licence." (*vide* Bankes L.J. in *Kimber* v. *Gas Light & Coke*[1]).

Furthermore, as Atkinson J. in *Hawkins* v. *Thames Stevedore Co.*[2] at page 476 held "there is also a common law obligation upon one invitee working upon the premises to warn another invitee working there of any danger which he may have created, and for which he is responsible."

That case involved a breach of statutory duties as well but I accept the principle cited so far as negligence at common law is concerned as between invitees, one of whom creates a dangerous situation.

As Lord Denning said in *Miller* v. *South of Scotland Electricity Board*[3] at page 37:

"We are not here concerned with the obligations of occupiers of land — as occupiers — or with the special rules applicable to trespassers thereon. We are concerned with the duty of care that is owed by a person doing work — or anything else — on land: and that duty is today best found by resort to the general principle enunciated by Lord Atkin in *Donoghue* v. *Stevenson*. Such a person — be he occupier, contractor or anyone else — owes a duty to all persons who are so closely and directly affected by his work that he ought reasonably to have them in contemplation when he is directing his mind to the task."

The principle enunciated by Lord Atkin in *Donoghue* v. *Stevenson*[4] at page 580 therefore can properly be invoked in support of the duty of care

ordinarily owed by a non-occupier to others lawfully on the premises. Lord Atkin said:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Counsel for the appellants laid special emphasis on this principle in support of the contention that the District Judge erred in law in finding that the respondents did not owe the workman any duty to take care He contended that the aforesaid rule applied so as to make the respondents liable in damages for the workman's injuries through their negligence.

Counsel for the respondents replied to the effect that the particular relationship between the workman and the respondents did not create a duty of care. He also contended that the workman knew of the defects in the scaffolding by inspection and therefore voluntarily undertook the risk with full knowledge of the consequences of what he was doing. He further submitted that the workman was a trespasser. He also said that there was no common interest between the injured workman and the respondents.

As I have already stated, there was no evidence that the workman had been warned or that he undertook the risk of standing on the scaffolding with such knowledge as to exonerate the respondents from their duty towards him as contractors engaged in a common Hotel project, together with the appellants, of laying mosaic tiles on the outer walls of the Hilton Hotel building. They were all fellow-invitees at the Hotel during the performance of their tiling contracts. The workman was not a trespasser whilst on the premises and there was no evidence that he was excluded from the use of the respondents scaffolding in any way nor were the appellants' contracts' supervisor or the clerk of works for the whole project so excluded from the scaffolding erected by the other. Nor, significantly, did anyone on behalf of the respondents say so.

Finally, the appellants were under no obligation in a claim such as this to give any notice under Regulation 13 to the respondents (who were outside the scope of section 19(2)) nor was any question requiring determination of the amount payable ever referred to arbitration at the instance of the respondents as was open to them under section 20(b).

In my judgment, the respondents by their failure to repair or remove their dangerous scaffolding after being repeatedly warned by the architect of the Hotel project to do so created a situation which they could reasonably foresee would be likely to injure persons like the workman in question who clearly fell within the proximity rule.

The appeal is accordingly allowed with costs.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Drew & Napier.*

MALAYSIAN REPORTS

LEE TECK HOCK v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) February 23, 1972]
[Sibu — Criminal Appeal No. 6 of 1971]

Criminal Law and Procedure — Order for retrial — Whether accused can be tried on original charge and alternative charge — Criminal Procedure Code (Sarawak Cap. 58), ss. 144 & 267(C).

The appellant had originally been convicted on a charge of driving a motor car without due care and attention. On appeal, the High Court quashed the conviction and ordered a new trial. Subsequently the appellant was charged with two charges, the original charge of driving a motor car without due care and attention and an alternative charge of driving the motor vehicle without reasonable consideration for other persons using the road. At the retrial he was convicted of driving without due care and attention. The alternative charge of driving without reasonable consideration for other persons using the road was struck out at the conclusion of the defence case. The appellant appealed. Section 267(c) of the Sarawak Criminal Procedure reads:-

"In an appeal from a conviction the court may

(a), (b). . . .

(c) direct that further inquiry be made or order a new trial on the same or an amended charge."

Held: as the learned judge had merely ordered a new trial in this case, it was wrong to allow the addition of an alternative charge to the original charge at the commencement of the case when it was reheard. As the proceedings seemed to contravene the order of the High Court and to depart from the ambit of section 267 of the Sarawak Criminal Procedure Code, the conviction and sentence must be set aside.

Cases referred to:-

(1) *R.* v. *Goh Choo Lan* 4 Ky. 407.

(2) *Lim Tuan Hong* v. *Herman Jebson & Co.* 4 Ky. 79.

CRIMINAL APPEAL.

Chong Siew Chiang for the applicants.

Steve Shim Lip Khiong (Deputy Public Prosecutor) for the respondent.

B.T.H. Lee J.: The appellant (the accused in the lower court) was originally charged as follows:—

"That you, on or about the 24th day of May, 1969 at or about 8.35 p.m. around 2nd mile Oya Road, Sibu, did drive a motor vehicle to wit, a private motor car bearing registration plate licence No. S. 2392, without due care and attention, thus resulting in your knocking down a man cyclist, and that you thereby committed an offence punishable under section 30 of the Road Traffic Ordinance, 1960."

He claimed trial and was represented by counsel.

In the event the appellant was convicted and fined $50 or two weeks' imprisonment in default. He appealed to the High Court on the ground that he was charged under the first limb of section 30 of the Road Traffic Ordinance, namely driving without due care and attention, and not charged under the first limb or second limb of section 30 of the Road Traffic Ordinance. In other words he was not charged in the alternative.

The section reads as follows:—

"30. Any person who drives a vehicle on a road without due care and attention, or without reasonable consideration for other persons using the road shall be guilty of an offence: Penalty, imprisonment for three months and a fine of five hundred dollars."

The learned judge in delivering judgment ordering a new trial in *Lee Teck Hock* v. *Public Prosecutor* (Criminal Appeal No. 1/70) said at page 2: